

## Underground Regulations Course Outline

### SLIDE #1

Welcome.

This is the Office of Administrative Law's class on underground regulations—what they are and how to deal with a challenge to an alleged underground regulation.

There are many resources on our website: [www.oal.ca.gov](http://www.oal.ca.gov)

All of our determinations are on line. The determinations are a good resource to get familiar with a variety of underground regulations issues.

The underground regulations program is informally known as the CTU or Chapter Two Unit. This is because the new regulations on underground regs are in Chapter 2 of OAL's regulations.

There are some definitions we will be using in this training:

The definition of an underground regulation includes guidelines, manuals, etc. In this training, we will refer to "rules" generally. When we say rule, we mean the entire list of possible underground regulations.

The definition of an underground regulation also refers to issuing, using, enforcing, etc. We will talk about using a rule as shorthand. Again, we mean the entire list of possibilities.

We will talk a lot about the APA. This is the Administrative Procedure Act, found at Government Code sections 11340 and following. The APA sets out the procedures you must to adopt regulations.

The APA talks about rulemaking agencies. Very often in state government, the term "agency" is used to mean Cabinet level agencies. But in APA terms, an agency is the individual state board, department, commission, etc, that has the statutory authority to adopt regulations. We will use the term agency in this training.

### SLIDE #2

Course Objectives.

Why are underground regulations important to you?

What is an underground regulation?

What is not an underground regulation?

Case and law overview.

OAL's role in underground regulations

The process OAL uses in evaluating petitions alleging an underground regulation.

The difference between a full determination and a summary disposition.

A section 280 certification.

What happens after OAL issues its determination?

Q&A

### **SLIDE #3**

Why are underground regulations important to you?

The short answer is that underground regulations will land you in court. The regulated public is very perceptive about APA issues.

Properly adopted regulations will not keep you out of court—you can still be sued over the content of the regulations. But properly adopted regulations will avoid a large category of procedure issues that you will not have to deal with.

### **SLIDE # 4**

What is an underground reg?

First, Government Code section 11342.600 defines a regulation.

"Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

### **SLIDE # 5**

Second, Government Code section 11340.5 prohibits the issuance, use, enforcement or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

### **SLIDE # 6**

California Code of Regulations, title , section 250 (a): "Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

An underground regulation, then, is a rule that an agency issues, that has not been adopted pursuant to the APA, but should have been.

### **SLIDE # 7**

So, what do we do with these definitions? The analysis has three basic parts.

### **SLIDE # 8**

First, Tidewater. *Tidewater Marine Western Inc v. Bradshaw* (1996) 14 Cal.4th 557 is the primary case that addresses underground regulations. Tidewater established a 2-part test to determine if a rule meets the definition of a regulation: Is the rule either:

A rule of general application or an amendment or supplement to a rule of general application?

Has the rule been adopted to either implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure?

In your handout at page 60 is a copy of a determination. Let's take a look at this and see how we apply this analysis.

This determination was a challenge to CalPERS rules governing how a member becomes a candidate for election to the CalPERS Board.

The first part of the determination sets out the challenged rule, and the arguments made by the petitioner and the agency.

On page 63, we get into the first Tidewater question: is it a rule of general application?

We concluded "yes", the rule applied to all members of CalPERS who seek election to the Board. It was a rule of general application

As pointed out in Tidewater, a rule of general application does not need to apply to every person in the state of California. It is enough that the rule applies to a certain class of cases or persons. In this case, the rule applied to all CalPERS members who wanted to become candidates for election to the board.

### **SLIDE # 9**

The second Tidewater test is has the rule been adopted to either implement, interpret, or make specific the law enforced or administered by the agency or govern the agency's procedure?

On page 64, we take a look at CalPERS' statutory mandate. CalPERS is required to hold elections for board members. The process it uses to hold those elections "implement, interpret, and make specific" the law enforced or administered by the agency.

So, our conclusion was that the two-part Tidewater test was met.

#### **SLIDE #10**

The third step in the analysis is to determine whether the rule is expressly exempted from the APA. We'll talk more about exemptions later.

As you can see on page 64, the agency response claimed that the challenged rule fell into the forms exemption. This argument highlights a common misconception about the forms exemption that we will talk more about shortly. Since we found that the forms exemption did not apply and we could not find any other exemption which would apply in this case, we concluded that the challenged rule was an underground regulation.

#### **SLIDE #11**

If the answers to the questions in this three-part analysis are:

- yes, it's a rule of general application and
- yes, the rule implements the law administered by the agency and
- no, there are no exceptions,

the challenged rule is an underground regulation.

Period, end of discussion. As you can see, there is very little wiggle room in this analysis.

It is important to understand that if the rule is an underground regulation, we cannot ignore the result because:

The reason or policy for having the underground regulation is a really good one. The rulemaking agency needs flexibility and does not want to amend regulation regularly.

The person challenging the underground regulation is a gadfly and no one likes him.

The agency has been doing it this way for years and years and no one has complained so far.

We sympathize with your position—we are in the same position ourselves, after all—but the APA requirements are mandatory.

#### **SLIDE # 12**

What is NOT underground regulation?

Believe it or not, many things are not underground regulations. They fall into three general categories:

Express statutory exemptions from the APA  
Restatements of statutes or regulations.  
Rules that do not meet the definition of a regulation.

## **SLIDE # 13**

### **Express Statutory Exemptions.**

There are statutory exemptions in the APA that are found in the APA. In addition, your individual agency may have full or partial exemptions from the APA. A specific program or even a part of a program may have its own exemption. OAL is not omniscient. You need to know your own agency's statutory provisions and you must tell us if a petition challenges a rule for which you have an exemption.

Government Code section 11340.9 lists several general exemptions. Most of these will not be helpful to you:

An agency in the judicial or legislative branch of government.

A legal ruling of counsel issued by the Franchise Tax Board or State Board of Equalization.

Forms. This exemption is not permission to regulate by using forms. The form must include only information required in a statute or in a regulation. Any additional information will raise the specter of an underground regulation. This is why OAL needs to see the form to ensure that it does not include regulatory material.

Internal Management. The courts have interpreted this exemption very narrowly. The concepts to remember are:

The rule affects only the employees of the issuing agency AND  
The rule does NOT involve "a matter of serious consequence involving an important public interest"

Examples: A rule stating that all employees must show up one hour before their shift starts is a rule of internal management.

A rule requiring all employees to be drug tested, is not a rule of internal management because it affects "a matter of serious consequence involving an important public interest".

Audits, Government code section 11340.9 (f). This exemption applies only if disclosure would:

Enable a law violator to avoid detection.  
Facilitate disregard of requirement imposed by law.

Give clearly improper advantage to a person who is in an adverse position to the state.

Only Legally Tenable Interpretation: The APA exempts any “regulation that embodies the only legally tenable interpretation of a provision of law”. For example, in the days before computers, a statute required an agency to conduct audits. The agency required the businesses to keep written books. The court held that the only way the agency could conduct the audit was to have access to the written documents. The rule requiring written documents, was, therefore, the only legally tenable interpretation of the law. The legal issues involving this exemption are usually much more complex than this, but the basic principle is the same – state agency enactments embodying the only legally tenable interpretation of the law are not underground regulations. For a discussion of this exemption, take a look at Morning Star. The citation is on page 58 of your handout.

Rate, Price Tariff, Government Code section 11340.9(g). This exemption is not what you might think. First, some definitions. These definitions are found in Black’s Law Dictionary:

A rate is “a fixed relation of quantity, amount or degree.” For example, a public utility may charge a rate to the public for a service open to all and upon the same terms. Unless you are the PUC or similar public utility, you won’t be able to use this.

A price is “something which one ordinarily accepts voluntarily in exchange for something else.” For example, our purple APA book is \$8. We don’t need a regulation to charge that price. If your cafeteria serves lunches, the price of peas is not an underground regulation.

A tariff is a “public document setting forth services of common carrier being offered, rates and charges with respect to services and governing rules, regulations and practices relating to those services.” So, unless you are a train or a ferry or a bus, this exemption won’t apply.

Now, let’s talk about a fee. A fee is “a charge fixed by law for services of public officers or for use of a privilege under control of government.” Almost all charges that a state agency imposes will fall under this category. Fees are not exempt from the APA.

A regulation relating to the use of public works when the effect of the regulation is indicated to the public by means of signs or signals or when the regulation determines uniform standards and specifications for official traffic control devices pursuant to Section 21400 of the Vehicle Code.

A regulation directed to a specifically named person or group of persons and does not apply generally throughout the state. These specifically named person or group must be by name. Louie Lowerlevel, Joe Schmuckatelli and Mary

Contrary. A group such as “all veterans” is not a specifically named group. Its members will come and go as time passes.

Also found in the APA is the exemption for precedent decisions. Government Code section 11425.60 is in the administrative hearing part of the APA. This is a limited exemption. It applies to situations in which an adjudicative hearing is required to be held. The decision in that hearing may be designated a precedential decision and enforced against other similarly situated stakeholders. For a discussion of this exemption, see 2007 OAL Determination #6. A recent 3rd Appellate District Case, *Corrales v Bradstreet*, also discussed the issue of precedent decisions and its analysis was similar to our determination. The citation to Corrales is in your handout.

There are also other exemptions found in other codes. For example, Penal Code section 5058 establishes an exemption for the Department of Corrections and Rehabilitation. It exempts rules made by individual prisons which apply only to that prison's inmates. This is called a local rule.

A local rule must be truly local. If the same rule is being adopted at all the prisons, it may not be a local rule. If the petitioner can establish that the same rule is being used by more than one prison, OAL will probably accept that petition.

Please understand that when you claim the exemption, we will look at it to be sure that the challenged rule falls under the criteria listed in the statute or any court cases that interpret the statute.

#### **SLIDE # 14**

The second general category of rules that are not underground regulations is restatements of statute or regulations.

Existing sections of the CCR are not underground regulations. Very often, we receive petitions that are unhappy with the content of a properly adopted regulation. This is beyond the scope of our review. A properly adopted regulation is not an underground regulation.

Existing statutory provisions are also not underground regulations. If you stick to the statute, you cannot go wrong. If you start interpreting or putting it into layman's terms or otherwise embroidering on the text of the statute, you can get into trouble.

#### **SLIDE # 15**

Finally, the third category of rules that are not underground regulations is rules that do not meet the definition of a regulation. These are referred to as case-by-

case decisions: Government Code section 11342.600 defines a regulation as “...every rule, regulation, order, or standard of general application...” A decision made on a case-by-case basis is not a rule or standard “of general application” and is therefore not required to be adopted pursuant to the APA.

But, keep in mind that the decision must be truly made on a case-by-case basis. If the agency makes the same decision in all cases, it is not a case-by-case basis. For example, the first petition we received challenged a rule that prohibited logging within a certain distance of an osprey nest. It was claimed that the rule was being enforced on a case-by-case basis. Clearly this was not so since the exact distance was used for every osprey nest.

## **SLIDE # 16**

There are several cases and laws that you should be aware of:

### **Statutes**

The definition of a regulation in Government Code section 11342.600.

The prohibition against underground regulations in Government Code section 11340.5.

The list of general exemptions in Government Code section 11340.9. We have already discussed those.

OAL has adopted regulations to implement and make specific these statutes.

California Code of Regulations, title 1, sections 250 and following.

These regulations define the term “underground regulations” and establish the procedure for challenging an alleged underground regulation.

## **SLIDE # 17**

There are also several cases you should be aware of. In your handout at page 57 is a list of these cases.

One of the most important is *Tidewater*. *Tidewater* establishes the two-part test that is the basis of OAL’s analysis:

Is the rule a standard of general application?

Does the rule Interpret or make specific an agency’s law?

Also important is *Grier v Kizer*. This case establishes that OAL decisions are entitled to great weight. This means that if you are taken to court on the issue of an underground regulation, the court is going to balance your interpretation with ours. The scales are stacked in our favor.

## **SLIDE # 18**

OAL’s role in underground regulations.



OAL's role is to make the determination on whether the challenged rule is or is not an underground regulation. We have no enforcement power. We have no subpoena powers.

But keep in mind that our determination carries great weight with the courts.

#### **SLIDE # 19**

The process OAL uses in evaluating petitions.

A petition challenging an underground regulation must be submitted to OAL. The petition must include a certification that the petitioner has sent it to the agency. Most often, the petition goes to the head of your agency. It is likely to be lost, misrouted or completely ignored. It would be a good idea to set up your own internal process for the receipt of a petition. Let your director's people know what the petition is and who is responsible for dealing with it.

#### **SLIDE # 20**

OAL has 60 calendar days in which to review the petition.

During this 60-day period, we make every effort to talk with the rulemaking agency to get an understanding of the issues. Our goal is to work with you to resolve the problem.

To this end, it would help greatly if we knew who in the agency is responsible for dealing with petitions. We keep a list of agency contact people. We encourage you to let us know who we need to contact.

Please contact Margaret to give us this information.

#### **SLIDE # 21**

The requirements for submitting a petition challenging an underground regulation are found in California Code of Regulations, title 1, section 260.

The petition must contain certain information:

Petitioner's name and contact information

Name of the agency using the challenged rule

Complete description AND A WRITTEN COPY of the rule

Description of the actions showing the agency has used the rule

Legal basis for concluding the rule is an underground regulation

Demonstration that the petition raises an issue of considerable public importance requiring prompt resolution

Certification that the petitioner sent a copy of the petition to the agency.

#### **SLIDE # 22**

OAL has 60 days in which to review the petition. By the end of this 60-calendar day review period, OAL must take one of four actions.

1. Incomplete
2. Accept

3. Summary Disposition
4. Decline

### **SLIDE # 23**

1. Incomplete: If the petition does not contain all the required information, we will send a letter to the petitioner asking for the missing information. The petitioner has 60 days to submit the information. If the information is received, the 60-day review clock begins again. If the petition is not completed, OAL will decline the petition.

### **SLIDE # 24**

2. Accept: If the petition is complete, OAL may accept the petition for consideration. If OAL accepts the petition, we will notify the petitioner and the agency. We will print the petition in the Notice Register along with a notice to the public that we are accepting comments. The clock for the process begins running when the petition is published in the Notice Register.

The public has 30 days in which to submit their comments.

The agency has 45 days in which to submit a response to the petition and any public comments. There is no requirement that the agency responds. But we highly recommend it. The agency's position is critical to our understanding of the issues.

The petitioner has 15 days after receipt of the agency's response to rebut the arguments in the response and any public comments.

After the comment periods, OAL will review all the documentation submitted. We may also do original research if we have any questions. We have 120 days after the date the petition is published in the Notice Register to issue our determination.

### **SLIDE # 25**

#3. Summary Disposition: If the petition is complete, and meets the criteria in section 270, OAL may issue a Summary Disposition. A Summary Disposition is a streamlined determination used in specific circumstances. More on Summary Dispositions later.

### **SLIDE # 26**

#4. Decline: OAL may decline to accept the petition. It is important to note that declining a petition has no impact on the merits of the petition.

### **SLIDE # 27**

Legal Analysis

If we accept the petition for consideration, our review is limited to the three-part test we discussed earlier.

Is the rule either:

A rule of general application or an amendment or supplement to a rule of general application?

Has the rule been adopted to either Implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure?

Is there an express exemption from the APA?

These questions are the only issues OAL looks at.

Petitioners often argue that the rule is bad for business, is unfair, is driving them into bankruptcy, or hurts their feelings. Your response should not get bogged down in the petitioner's extraneous arguments. If you feel that a discussion of these issues will help give us a clearer understanding of the whole picture, go ahead and respond to the petitioner's arguments. However, OAL can make no finding that a rulemaking agency has been mean to someone. Our review is limited to the three questions. That is where your response should focus.

## **SLIDE # 28**

The difference between a full determination and a summary disposition.

Summary disposition

During the 60-day review period, OAL has the option of accepting the petition for a full determination, or issuing a summary disposition.

The summary disposition is a new process. The regulations establishing the summary disposition were effective on July 9, 2007. Pursuant to section 270(f), if the completed petition does not demonstrate that an underground regulation exists, we can choose to do a summary disposition. The SD is a quick analysis of the challenged rule and the finding that no underground regulation exists. We can only use it to find that there is no underground regulation.

## **SLIDE # 29**

The circumstances in which we may do a summary disposition are listed in 270(f).

The challenged rule has been superseded.

The challenged rule is contained in a California statute.

The challenged rule is contained in a properly adopted regulation.

The challenged rule has expired by its own terms.

The challenged rule is covered by an express exemption from the APA.

On page 67 of your handout, there is a sample summary disposition. In this case, the petitioner challenged a rule adopted by the CSU Long Beach campus.

His analysis was that the rule met the two-part Tidewater test. However, he did not look into the possibility of exemptions. The Education Code exempts rules adopted by the CSU Trustees from the requirements of the APA. Since this rule is exempt, we did a SD to resolve the issue quickly.

The availability of the summary disposition highlights the importance of us reaching the appropriate person at the agency. If we can talk to someone who points out that the alleged underground regulation falls into the circumstances described in section 270(f), it makes all our lives a little easier.

### **SLIDE # 30**

Full determination

If the challenged rule does not fall under the provisions of section 270 (f), OAL will do a full determination. This entails a complete analysis of the three questions. It is longer, more detailed and entails much more work on both our parts.

We have given you a sample of a full determination. You can see the difference between the Summary Disposition and the full determination.

### **SECTION # 31**

The section 280 certification

The section 280 certification is a way to defuse the issues raised by a petition. At any point in the process before the determination is issued, the agency may decide not to enforce the challenged rule. Section 280 permits the agency to certify that it will not enforce the rule. OAL must suspend all action on the petition at that point. The petitioner is notified and the certification is printed in the Notice Register.

The section 280 certification must be done by the head of the agency or his or her delegate. Please note that the delegations we have on file for signing the Form 400 or 399, do not include the section 280. You will need a separate delegation. A sample delegation and a sample certification are in your handouts.

Keep in mind that the section 280 stops the OAL determination process. A court may still find that the challenged rule was an underground regulation and may fashion whatever remedy it wants.

### **SLIDE # 32**

What happens after OAL issues its determination?

OAL's role in underground regulations ends with the issuance of a determination. We have no enforcement powers—we can't stop you from enforcing the underground regulation.

If you disagree with our determination, Government Code section 11340.5 provides "any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination was published."

The petitioner can take you to court to stop enforcement of the underground regulation. As we noted earlier, the courts have held that our determination is entitled to great weight.

Also, Keep in mind Government Code section 11340.5 (e) which prohibits a court or administrative agency from considering a determination in an adjudicatory proceeding if:

The proceeding involves the party that sought the determination from the office.

AND

The proceeding began prior to the party's request for the office's determination.

AND

At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that is the legal basis for the adjudicatory action is a regulation as defined in Section 11342.600.

### **SLIDE # 33**

So, that's the story of underground regulations. Any questions?